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IN THE

Supreme Court of the United States

OCTOBER TERM, 1979

No. 79-1327

SHIRLEY THRASH NORMAN,

Petitioner,

v.

THE STATE OF TEXAS,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CRIMINAL APPEALS FOR THE STATE OF TEXAS

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To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

SHIRLEY THRASH NORMAN, the Petitioner herein, prays that a writ of Certiorari issue to review the opinion and judgment of the Court of Criminal Appeals of the State of Texas entered in the above entitled case on September 19, 1979.

OPINIONS BELOW

The opinion of the Court of Criminal Appeals is reported at 588 S.W.2d 340 and a copy of the opinion is printed in Appendix A attached hereto, *infra*.

JURISDICTION

The opinion of the Court of Criminal Appeals was delivered on September 19, 1979. A timely filed Motion for Rehearing En Banc was denied on October 31, 1979, without opinion. Shortly thereafter the Mandate to the trial court was issued. An Order Extending Time to File Petition for Writ of Certiorari was entered in this Honorable Court on January 29, 1980. (Appendix D). Jurisdiction of the Supreme Court is invoked under 28 United States Code Section 1257.

QUESTIONS PRESENTED

I.

Whether the trial court's allowance of a spurious Fifth Amendment claim, asserted by the State's agent and informant, was a denial of Petitioner's Sixth Amendment right to compulsory process to obtain testimony material to any defenses which might have been available to her.

II.

Whether or not Petitioner's Sixth and Fourteenth Amendment rights were violated by the Court of Criminal Appeal's refusal to recognize as a matter of

law the Petitioner's right to a vicarious entrapment defense.

III.

Whether Petitioner's Sixth and Fourteenth Amendment rights to a fair and impartial trial by jury were violated by the trial court's *ex parte* examination of four female jurors at the close of testimony, which intimidated the jury by placing it under suspicion causing jury misconduct, and biasing them against Petitioner.

STATUTES INVOLVED

The Sixth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State in the district wherein the crime shall have been committed, * * * to have compulsory process for obtaining witnesses in his favor, and to have the assistance of counsel for his defense."

The Fourteenth Amendment to the Constitution of the United States provides in pertinent part as follows:

> "No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws."

Article 4476-15, Section 4.03(a), Texas Controlled Substances Act, the statute under which the Petitioner was prosecuted, reads as follows:

> "Except as authorized by this Act, a person commits an offense if he knowingly or intentionally manufactures, delivers or possesses with intent to manufacture or deliver a controlled substance listed in Penalty Group 1,2,2, or 4."

Heroin is a controlled substance listed in Penalty Group 1 of the Texas Controlled Substance Act, Art. 4476-15, §4.02(b), and delivery of heroin is a first degree felony, Art. 4476-15, §4.03(b).

The Texas Penal Code, §7.01 reads as follows:

> "(a) A person is criminally responsible as a party to an offense if the offense is committed by his own conduct, by the conduct of another for which he is criminally responsible, or by both.
>
> (b) Each party to an offense may be charged with commission of the offense.
>
> (c) All traditional distinctions between accomplices and principals are abolished by this section, and each party to an offense may be charged and convicted without alleging that he acted as a principal or accomplice."

The Texas Penal Code, §8.06 reads as follows:

> "(a) It is a defense to prosecution that the actor engaged in the conduct charged because he was induced to do so by a law enforcement

> agent using persuasion or other means likely to cause persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment.
>
> (b) In this section 'law enforcement agent' includes personnel of the state and local law enforcement agencies as well as of the United States and any person acting in accordance with instructions from such agents."

STATEMENT OF THE CASE

Case History

On June 28, 1976, Petitioner SHIRLEY THRASH NORMAN was convicted by the jury of the 199th District Court of Collin County, Texas, for violation of Article 4476-15, Texas Controlled Substances Act, §4.03(a), which is delivery of heroin, and received a fifty year sentence in the Texas Department of Corrections.

Petitioner appealed her conviction to the Court of Criminal Appeals in Austin, Texas, and, on September 19, 1979, her conviction was affirmed; a timely filed Motion for Rehearing En Banc was denied without opinion on October 31, 1979. Thereafter, the Mandate from the Court of Criminal Appeals issued to the trial court ordering affirmance of the trial court judgment. An Order Extending Time to File Petition for Writ of Certiorari was entered on January 29, 1980, giving petitioner until February 27, 1980, to make her application herein.

Facts

On January 28, 1976, Troy Braswell, a narcotics agent employed by the Texas Department of Public Safety, received a phone call from Dewayne Hamilton, a confidential informant whom he had used on prior drug related cases. Informant Hamilton told agent Braswell that he had arranged a "meeting" for the sale of some heroin in the afternoon of January 29, 1976, at the Dallas North Airport located in Collin County, Texas. Hamilton had originally "arranged" the meeting with Domingo Reyes, a reputed drug dealer, who in turn asked his friend Al Norman to come along for "protection." Petitioner is the wife of Al Norman.

Agent Braswell, together with other law enforcement persons, stationed themselves at that location on that day. When Agent Braswell arrived, he met with Domingo Reyes, who was accompanied by his wife, both having arrived previously in their own vehicles.

After a brief conversation with Reyes, Agent Braswell exhibited $10,000 in case which was to be used for the purchase of the heroin. Reyes then motioned to the occupants of a vehicle which was parked along the highway some 30 to 40 feet from the location of the transaction then taking place between Reyes and Braswell. This vehicle was occupied by Petitioner's husband, Al Norman, while Petitioner was outside the car, apparently walking a dog. Reyes then motioned in the direction of the Norman's and Al Norman exited the car, walked around to Petitioner, and handed her a beige-colored Rexall sack which she then carried to Domingo Reyes, handing the sack to him through the open window of his car. Reyes in turn delivered the sack containing the heroin to Agent Braswell. The heroin

itself was contained in four rubber prophylactics wrapped in foil and taped shut and were in the beige Rexall sack carried by Petitioner. Reyes had apparently given the sack containing the heroin to Al Norman earlier in the day as a "safekeeping" measure until the drug transfer was judged to be safe. There was no direct evidence that Petitioner could have looked into the sack and/or known its content. Petitioner's husband denied her knowing what was in the sack, telling the jury that he and his wife were not speaking that day because of a quarrel.

The subsequent search of the Norman vehicle revealed more heroin which was contained in a cellophane package found over the sunvisor of the drive side of the car where Al Norman had first been observed. The sale arranged by Domingo Reyes, with the assistance of Al Norman, from the evidence presented, was entirely the product of Hamilton, Reyes, and Al Norman. There is no evidence in the trial records which showed that Shirley Norman was ever made a party to the "goings on" which were involved in this drug sale, other than her brief role as courier of the sack.

The record clearly established that Dewayne Hamilton was an agent of the State; that he had "arranged" the drug delivery with Domingo Reyes; that he had frequently acted as an informer for Agent Braswell and other law enforcement officers on other narcotics transactions in the past; and that Agent Braswell had worked with Dewayne Hamilton to set up the transaction with Domingo Reyes because Braswell believed Reyes was a dealer in heroin.

Though Petitioner's trial counsel obtained the presence of informant Dewayne Hamilton at the trial

through a subpoena and writ of attachment, Hamilton refused to answer some twenty-four questions posed by counsel about Hamilton's involvement in this particular transaction by taking the Fifth Amendment. Counsel's apparent purpose in the asking of these questions was to learn if Petitioner herself had been entrapped somehow through the entrapment of Domingo Reyes. The trial court refused to grant immunity to Dewayne Hamilton to allow him to testify or to conduct a hearing into whether or not Hamilton's Fifth Amendment claim was spurious.

The Court of Criminal Appeals held, *inter alia*, as a matter of law Hamilton was clearly acting as an informant agent of the State, and that the trial court committed constitutional error in failing to grant him immunity and compelling him to testify. Petitioner had led Hamilton to the water, but without the trial court's help, could not make him drink.

The Court of Criminal Appeals' Decision

The Texas Court of Criminal Appeals held, that (1) the evidence which showed that the accused (Petitioner) was not *merely* present at the time the heroin was delivered, but that she exercised dominion and control over the sack, which contained heroin, which she carried from her car to another car was sufficient to establish possession regardless of her husband's testimony that he and Petitioner were not on speaking terms and that she did not know the contents of the sack; (2) for the entrapment defense to have benefitted Petitioner, there must have been a *direct link* between Petitioner and the law enforcement agents and that therefore Petitioner's claim of a "vicarious entrapment" defense (that a State

agent entrapped another who had enlisted the help of Petitioner's husband, who in turn enlisted Petitioner's help to deliver the heroin) was not a valid defense under the law; and (3) that where the Petitioner in fact had *no* defense of entrapment, the error by the trial court in denying a constitutional right to call a witness by not compelling the State's informant to give answers to counsel's questions or to inquire into reasons behind his assertion of the Fifth Amendment, was harmless beyond reasonable doubt.

REASONS FOR GRANTING THE WRIT

A. CERTIORARI SHOULD BE GRANTED IN THIS CASE TO DETERMINE WHETHER THE TRIAL JUDGE'S ALLOWANCE OF A SPURIOUS FIFTH AMENDMENT CLAIM, ASSERTED BY THE STATE'S INFORMER, DENYING PETITIONER HER SIXTH AMENDMENT RIGHT TO CALL A WITNESS TO SUPPORT HER "VICARIOUS ENTRAPMENT" DEFENSE AS WELL AS ANY OTHER DEFENSES WHICH MIGHT HAVE SHOWN THEMSELVES AVAILABLE TO HER, WAS HARMLESS ERROR BEYOND A REASONABLE DOUBT [Germane to Question I]

The Sixth Amendment requiring compulsory process for a witness is applicable to the individual states. *Washington v. Texas,* 388 U.S. 14, 87 S.Ct. 1920, 18 L.Ed2d 1019 (1967); *Webb v. Texas*, 409 U.S. 95, 93 S.Ct. 351, 34 L.Ed2d 330 (1972).

In *Washington, supra*, this Court said:

> The right to offer the testimony of witnesses, and to compel their attendance, if necessary, is in plain terms the right to present a defense, the right to present the defendant's version of the facts as well as the prosecution's to the jury

> so it may decide where the truth lies. Just as an accused has the right to confront the prosecution's witnesses for the purpose of challenging their testimony, he has the right to present his own witnesses to establish a defense. This right is a fundamental element of due process of law.

More Than One Defense Available

Informant Hamilton was possessed of personal knowledge of all the material facts surrounding this particular narcotics transaction. He clearly knew what transpired between himself and Agent Braswell, and between himself and Domingo Reyes or others. Maybe he knew much more than that which appeared on the surface, (i.e., the entrapment of Domingo Reyes, hence the entrapment of Petitioner.

The Court of Criminal Appeals did not consider the possibility that Hamilton, if compelled to testify, might have revealed vital facts material to *other* defenses which Petitioner could rely on such as lack of "knowledge" or "intent", "duress" or "mistake of fact", or even her own direct entrapment. For this reason alone, Petitioner was entitled to hear Hamilton's testimony, even though not one shred of his testimony might have aided her "vicarious entrapment" approach. It is likely that entrapment was one of many defenses that her counsel was grappling for in the tangled web of narcotics "deals," agents and informants – an ugly business itself which the jury was entitled to hear about to aid in its decision. See *Davis v. Alaska,* 415 U.S. 308, 94 S.Ct. 1105 (1974).

Vicarious Entrapment Immaterial

The point is not whether "vicarious entrapment" exists under Texas law or not, as the Court of Criminal Appeals held in finding "harmless error", but rather, whether it was "harmless error" to refuse to allow Hamilton to testify at all about anything – it being obvious he was a *very* involved witness. *Chapman v. California,* 368 U.S. 18, 87 S.Ct. 824, 17 L.Ed2d 705 (1976). How much real harm was done this Petitioner, by State action, in denying her the right to look at the whole transaction, bit by bit, piece by piece, to learn how she had come to be charged with this "delivery" of heroin, is the issue.

Harm Must Be Presumed

Harm can only be presumed because there is no way that we shall know what Hamilton would have said. The trial judge would not even make inquiry into the validity of his Fifth Amendment claims. No matter how ingenious counsel's questions directed to Hamilton might have been concerning his role in the transaction, it was not humanly possible without Hamilton's answers, to know what line of questioning would prove fruitful for his client. He stopped after twenty-four (24) questions to ask for immunity.

The Sixth Amendment Has No Limits

Apparently, by examining the twenty-four questions counsel asked before requesting immunity for Hamilton, the Court of Criminal Appeals concluded he was "stalking a "vicarious entrapment" defense, and obviously he was at that point. But the court's conclusion that no

harm was done because as a matter of law that defense didn't exist, amounts to placing limits on the Sixth Amendment. It requires counsel to be omniscient – to read the witness's mind – when only a probing, searching examination could do the job. Only by questioning the witness did he have any chance to learn facts giving rise to other possible defenses.

Conclusion

The Sixth Amendment knows no limitations. The Court cannot force a defendant to show what facts he expects a witness to reveal before he is allowed to have that witness's testimony. The fact that a witness, hostile to a defendant, *might* reveal a defense is enough to justify compelling the witness's testimony, especially when that witness is clearly a State agent, and immunity could unlock the door and remove all doubt.

B. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER OR NOT PETITIONER SIXTH AND FOURTEENTH RIGHTS WERE VIOLATED BY THE TEXAS COURT OF CRIMINAL APPEAL'S REFUSAL TO RECOGNIZE A MATTER OF LAW THE PETITIONER'S CLAIM TO A "VICARIOUS ENTRAPMENT" DEFENSE. [Germane to Question II).

Department of Public Safety narcotics agent, Troy Braswell, "employed" drug informant Dewayne Hamilton to "set up" a narcotics transaction between he (Braswell) and Domingo Reyes. Domingo Reyes employed his friend Al Norman to assist him in completing the transaction. Al Norman in turn sent his wife some 30 to 40 feet across a field to deliver a closed sack containing heroin to Domingo Reyes, who in turn handed it to the narcotics agent. For that she got fifty (50) years.

If Dewayne Hamilton, acting as an agent of the State, "entrapped" Domingo Reyes into selling the heroin to Agent Braswell; and if in turn, Reyes employed Al Norman who then used his wife to participate in the "delivering" of the heroin, why should the defense of entrapment not pass down the line from the person most directly involved, in this case Reyes, to the person obviously least involved, in this case, the Petitioner, wife of Al Norman.

The Texas Penal Code, Section 7.01, *supra*, makes every person who is a party to an offense, criminally responsible for the offense, and abolishes all traditional distinctions between accomplices and principals. This means that although Petitioner was the least involved in the "delivery" of the heroin in this case, it was good enough to get her fifty (50) years in the penitentiary.

It denies Petitioner her right to equal protection under the laws, under the Fourteenth Amendment, to allow her to be found just as guilty of delivery of heroin as was Domingo Reyes on the one hand, and on the other to say that his entrapment, if any, could not be entrapment of her as a matter of law.

Thus, the Texas Court of Criminal Appeals interpretation of Section 8.06 of the Penal Code, defining entrapment, is unconstitutional as applied to petitioner in this case. In the most extreme case, the party most responsible for committing the offense, Domingo Reyes, could be acquitted by a jury on his defense of entrapment, while the party least responsible and culpable for the offense, Petitioner, would have no defense of entrapment. The operation of such a law would be clearly unjust, inequitable, and unconstitutional.

C. CERTIORARI SHOULD BE GRANTED TO DETERMINE WHETHER OR NOT PETITIONER'S SIXTH AND FOURTEENTH RIGHTS (TO A FAIR AND IMPARTIAL TRIAL BY JURY) WERE VIOLATED BY THE TRIAL COURT'S EX PARTE EXAMINATION OF FOUR FEMALE JURORS AT THE CLOSE OF TESTIMONY, WHICH INTIMIDATED THE JURY BY PLACING IT UNDER SUSPICION AND BIASED THEM AGAINST PETITIONER [Germane to Question III].

During the trial of Petitioner's case, at the close of all testimony, the jury was discharged on a Friday afternoon with instructions to return the following Monday, to not discuss the case while away from the jury room. When the court reconvened the following Monday morning, the court, after clearing the courtroom of spectators, conducted an *ex parte* examination of four female jurors telling them that the court had "reliable information that a female member of the jury who resides in McKinney, Texas, got a message indirectly to the defendant in this case."

The court inquired of these female jurors whether or not they had received telephone calls or visits, or had any contact with anyone for the purpose of discussing the case. Petitioner's trial counsel, who had no advance notice of the purpose of the Court's examination, objected on the grounds that the trial court was suggesting to the juror's that one of them had made a promise to the defendant (Petitioner) that she wasn't going to be found "guilty" and that now the jurors would have to overcompensate for this suspicion by finding Petitioner "guilty."

After all the female jurors answered the court's questions in the negative, the court revealed that the purpose

for its examination had been the fact that the court received "information which the court felt was reliable, that over the weekend a member of the jury who was a female was contacted relative to a Donna Turner who was previously convicted of a felony offense of delivery of heroin in this court, and that allegedly a message was sent to the defendant through another inmate of the jail for her not to worry because she won't be railroaded the way Donna Turner was."

Petitioner's counsel again objected that examination of the jurors was improper and prejudicial and that the "reliable information" was not revealed by the trial court to Petitioner's counsel for purposes of further investigation. The trial then proceeded, the charges read to the jury, and the "guilty verdict" was returned. Thereafter defendant was sentenced to fifty years in the Texas Department of Corrections.

From the record, it appears that the juror's answers to the court's questions vindicated suspicion of their misconduct. But the real damage was done by the words and actions of the trial court in placing individual members of the jury under suspicion, to the exclusion of other members of the jury. Thus an aura of mistrust was placed in the jury chambers just before the critical time of deliberations.

The actions of the trial judge could only have caused the individual jurors to overcompensate for the suspicion they had been placed under by finding the Petitioner "guilty" and assessing a fifty-year punishment.

The Fourteenth Amendment to the United States Constitution creates the affirmative right of an accused to "due process of law" in State courts and makes the Sixth Amendment applicable to the individual states. Peti-

tioner's right to "impartial jury" under the Sixth Amendment was severely impaired. In *Remmer v. United States,* 347 U.S. 227, 74 S.Ct. 450 (1954), the Supreme Court held that where the defendant learned for the first time after his "guilty verdict" that a person had remarked to a juror during trial to the effect that the juror could profit by rendering a verdict favorable to the defendant, and that even though the matter had been investigated by the F.B.I. at the judge's request, the defendant was entitled to a hearing to determine the effect of the remark to the juror to the resulting investigation on the jury, and as to whether or not the defendant had been prejudiced thereby.

Speaking of the investigation in *Remmer,* Mr. Justice Minton said:

> We do not know from this record, nor does the petitioner know, what actually transpired, or whether the incidents that may have occurred were harmful or harmless. The sending of an F.B.I. agent in the midst of a trial to investigate a juror as to his conduct is bound to impress the juror and is very apt to do so unduly. A juror must feel free to exercise his functions without the F.B.I. or anyone else looking over his shoulder. The integrity of jury proceedings must not be jeopardized by unauthorized invasions. 347 U.S. 229.

The point is made that whether or not the misconduct occurred, the harmful prejudice resulted from the investigation ordered by the judge. The harm in the instant case is even more readily seen by taking into account the fact that the trial court itself conducted the inquiry whereas in *Remmer* the trial court had the F.B.I. conduct the investigation. Thus, the direct power,

influence and prestige of the trial court itself was brought to bear on the jurors to the great prejudice of Petitioner.

Petitioner, like the petitioner in *Remmer,* had no way of knowing from the record what had actually happened. The quote "reliable information" known only to the trial judge was not made available to Petitioner even though Petitioner's trial counsel objected. Unless the jury vindicated themselves by finding the Petitioner "guilty", they were bound to come under the direct suspicion of the trial court with possible further ramifications for violating jury instructions. In essence, the trial judge held this "reliable information" over the jury like a "Sword of Damacles" until the jury had vindicated the suspicion placed on them by finding the Petitioner "guilty" and assessing a length sentence.

Therefore, for these reasons, Petitioner's Sixth Amendment right to an "impartial jury" was violated.

CONCLUSION AND PRAYER

WHEREFORE, Petitioner prays that this Application for Writ of Certiorari to the Texas Court of Criminal Appeals be granted and that the judgment of the Texas Court of Criminal Appeals be vacated and reversed. Petitioner prays for such other relief, whether in law or in equity to which she may show herself justly entitled.

Respectfully submitted,

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APPENDIX A

SHIRLEY THRASH NORMAN, Appellant
NO. 56,831 v. Appeal from COLLIN County
THE STATE OF TEXAS, Appellee

OPINION

This is an appeal from a conviction for the offense of delivery of heroin. Punishment was assessed at 50 years' confinement in the Department of Corrections. Appellant initially challenges the sufficiency of the evidence to prove she intentionally and knowingly delivered the heroin.

The record reveals, in a light most favorable to the verdict, that Troy Braswell, a narcotics agent employed by the Texas Department of Public Safety, received a telephone call on January 28, 1976, from Dewayne Hamilton, a confidential informant, that a meeting for a sale of heroin had been arranged for the afternoon of January 29, 1976, at Dallas North Airport in Collin County. Agent Braswell, together with other agents and law enforcement persons, proceeded to that location on that day. Upon Braswell's arrival, he met with Domingo and Ruby Reyes, who had arrived in another vehicle. Shortly thereafter, the agent and the Reyeses moved their vehicles to another location at the airport. After a brief conversation, during which Agent Braswell showed Reyes $10,000.00 for the purchase of the heroin, Reyes motioned to the occupants of another vehicle that the agent had observed during the conversation. This vehicle was occupied by appellant and her husband, Albert Norman. After Reyes motioned, Al Norman left their car, walked around the car to appellant, who was already out of the car, and handed to appellant a sack which

she then carried to Agent Braswell and Reyes' location. She delivered the sack to the agent. The sack contained four prophylactics containing heroin. After the arrest of appellant and the other persons, a search of the Norman vehicle revealed a cellophane package found over the sun visor of the driver's side where Mr. Norman was observed. This package contained heroin.

Possession of the heroin need not be exclusive and evidence which shows that the appellant jointly possessed the contraband with another is sufficient, Martinez v. State, 539 S.W.2d 885; Woods v. State, 533 S.W.2d 16; Curtis v. State, 519 S.W.2d 883, and cases cited therein. However, a finding of joint possession cannot be justified solely by proof of mere presence of an accused at a place where contraband is being used or possessed. Ayers v. State, 570 S.W.2d 926; Brooks v. State, 529 S.W.2d 535; Harrison v. State, 555 S.W.2d 736.

Whether the theory of prosecution is sole or joint possession, the evidence must affirmatively link the accused to the contraband in such a manner and to such an extent that a reasonable inference may arise that the accused knew of the contraband's existence and of its whereabouts. Hernandez v. State, 538 S.W.2d 127; *Curtis v. State,* supra; Payne v. State, 480 S.W.2d 732. This affirmative link is established by showing additional facts and circumstances which indicate the accused's knowledge and control of the contraband. Long v. State, 532 S.W.2d 591; Hineline v. State, 502 S.W.2d 703.

In this case, more than appellant's mere presence is shown. Appellant exercised control over the sack, not stapled or shut, containing the heroin in which she carried from her car to the Reyes car. Agent Braswell testified Reyes said that his runners, indicating appellant

and Norman, would bring the heroin to his car upon his (Reyes's) seeing the money. This conversation occurred at both locations.

The heroin found over the driver's visor of the Norman car was that which appellant's husband, a heavy heroin addict shooting approximately $600.00 a day and who "fixed" three or four times a day and who had purchased heroin from Reyes on prior occasions, had obtained from Reyes for his part in the deal. Norman had received it at Reyes's house earlier that morning when he received the sack and a "fix" for payment. Appellant allegedly waited in the car, but the sack of heroin was placed under appellant's car seat when they left the Reyes house.

Following the Reyes car, with the heroin in the Norman car, they proceeded from Oak Cliff to the Mobil Station at Highway 544 and Preston Road. At that location, they met Hamilton. With the appellant present, Reyes removed the sack from underneath the seat of appellant and went with Hamilton into the restroom at the Mobil Station where Reyes gave Hamilton some of the heroin from the sack for his (Hamilton's) part in the transaction. Reyes again placed the heroin under the seat of the Norman car with the appellant present and all of the parties proceeded to Dallas North Airport. Norman testified, however, that because he and his wife were not speaking, appellant did not know the contents of the sack.

The jury, being the judge of the credibility of the witnesses, could accept or reject some or all of their testimony. Drager v. State, 548 S.W.2d 890. The language in Cockrell v. State, 117 S.W.2d 1105, is applicable. It is as follows:

> . . . we are not allowed to substitute our judgment for that of the jury, and should not disturb the verdict unless no facts are found to support it. . . .

Based upon these facts and circumstances, the jury could reasonably infer that the appellant knew of the heroin's existence, thereby indicating her knowledge and control. We find the evidence sufficient to sustain the verdict. Appellant's first ground of error is overruled.

Appellant's second ground of error alleges that the trial court erred in failing to grant immunity from prosecution to the State's informant, Dewayne Hamilton, when he refused to answer questions on Fifth Amendment grounds because the evidence showed that he was an agent of the State and his testimony was necessary to appellant's defense of "vicarious entrapment," thereby denying appellant her right to compulsory process for obtaining witnesses for her defense in violation of the Sixth and Fourteenth Amendment.

An examination of Dewayne Hamilton's claim against self-incrimination in this case reveals that his claim was spurious and that he was an agent of the State, but the trial court allowed such claim to prevail. The questions presented are whether the trial judge's allowance of a spurious Fifth Amendment claim asserted by the State's informer denied appellant her Sixth Amendment right to call a witness to support her vicarious entrapment defense and if so, was this denial harmless beyond a reasonable doubt.

This is not the first time the trial judge and the State's informant Dewayne Hamilton have come face to face in the same trial. In Ex parte Turner, 545 S.W.2d 470, the same trial judge also allowed Dewayne (Duane)

Hamilton to claim his Fifth Amendment privilege based upon an undercover agent's sworn denial that he had any relationship with Hamilton. When this Court instructed the trial court in that case to conduct another evidentiary hearing allowing the petitioners in that habeas corpus proceeding to call Hamilton as a witness, the same trial judge made a fact finding that: "This court finds that Hamilton *could* have been the informant in the transaction and *could* have played a material part in bringing the parties together for the alleged transaction . . ." and that based upon this evidence, Hamilton's Fifth Amendment claim was "without substance," and had the court heard the evidence subsequently given by both the undercover agent and Hamilton at the time of the original trial, the court would not have allowed the claim. (Emphasis added)

The trial court filed these Additional Findings of Fact and Conclusions of Law on April 5, 1976.

On June 23, 1976, two and a half months after he filed the above findings, the trial judge heard evidence in the instant case from State Undercover Agent Braswell that Hamilton *was* the informant in the transaction involving the appellant, *did* play *the* major part in bringing Reyes and Braswell together, and was acting in accordance with instructions from Agent Braswell. Despite this, and his prior findings concerning Hamilton two and a half months before, the trial court again allowed Hamilton to claim his Fifth Amendment privilege against self-incrimination when asked questions concerning himself and Reyes. The law is well settled that if Hamilton was actually working at the direction of and in conjunction with Agent Braswell, he was acting as a

State agent and his claim of privilege under the Fifth Amendment was spurious. *Ex parte Turner,* supra.

> The witness is not exonerated from answering merely because he declares that in so doing he would incriminate himself — his say-so does not of itself establish the hazard of incrimination. It is for the court to say whether his silence is justified . . . The trial judge in appraising the claim "must be governed as much by his personal perception of the peculiarities of the case as by the facts actually in evidence."
>
> Hoffman v. U.S., 341 U.S. 479, 71 S.Ct. 814 (1951)

Moreover, assuming that informer Hamilton's taking the Fifth Amendment was a case of first impression with the trial court, we find the procedure followed below erroneous.

At the trial, pursuant to appellant's motion to call Dewayne Hamilton as an adverse witness, a hearing was conducted outside the presence of the jury. All questions propounded to Hamilton concerning his relationship to Reyes and Agent Braswell, his role as an agent of the State, and the heroin delivery were answered: "I refuse to answer on the grounds it may tend to incriminate me." In fact, Hamilton was asked some twenty-four questions by defense counsel, all answered with a claim of the Fifth Amendment, before defense counsel was forced to ask for a grant of immunity. Before this time, the trial court made *no* inquiry into the validity of Hamilton's self-incrimination claim.

In U.S. v. Gomez-Rojas, 507 F.2d 1213 (5th Cir. 1975), the defendant pleaded that he had been entrapped

by government informer Smith. The informer resisted a defense subpoena by claiming his Fifth Amendment privilege, which the district court upheld without making any inquiry into the validity of the claim. The court there held that the trial court erred by accepting the informer's assurances at face value without determining whether his fear of self-incrimination was well founded and what the parameters of his Fifth Amendment rights were in the context of the testimony that the defense counsel had tried to obtain from him.

United States v. Waddell, 507 F.2d 1226 (5th Cir. 1975), held that where the defendant's sole defense to a charge of possession of cocaine with intent to distribute was that a paid government informer entrapped him into selling contraband, the district court's decision to excuse the informer from giving testimony on the basis of a bald assertion of Fifth Amendment privilege without conducting a hearing in the absence of the jury into the facts underlying such an assertion was error.

However, given the facts of this case regarding Hamilton's informer-agent status, it is axiomatic that the appellant has a right to call him as a defense witness and to offer his testimony to the jury.

> The right to offer the testimony of witnesses and to compel their attendance, if necessary, is in plain terms the right to present a defense . . . This right is a fundamental element of due process of law.
>
> Washington v. Texas, 388 U.S. 14, 87 S.Ct. 1920 (1967); also Webb v. Texas, 409 U.S. 95, 93 S.Ct. 351 (1972)

We hold that the trial court committed constitutional error in not granting appellant's request for immunity

for informant Hamilton. The next order of inquiry is whether the trial court's denial of appellant's Sixth Amendment right to compulsory process and presenting a defense, by the court's allowing Hamilton to not answer questions propounded to him or not conducting a hearing to ascertain his reason for not doing so, was constitutional error "harmless beyond a reasonable doubt." Chapman v. California, 368 U.S. 18, 87 S.Ct. 824 (1966); United States v. Mayer, 556 F.2d 245 (5th Cir. 1977). To answer this, we must look to the materiality and relevancy of the questions asked Hamilton to find if appellant was denied presenting a defense when the questions were not answered.

The sole reason, as expressed by appellant's counsel in having Hamilton testify, was to present an entrapment defense. However, this entrapment defense was a "vicarious" one in that the appellant was trying to prove that because Hamilton, a State agent, possibly entrapped Domingo Reyes, who then enlisted the help of the appellant's husband, who then enlisted appellant's help as deliverer of the heroin, appellant, although thrice removed from the government agent and never directly contacted by him, could avail herself of the entrapment defense which could possibly be asserted by Reyes. Such a "vicarious" entrapment defense is a case of first impression before this Court.

Before passing on this question, however, we must address the State's misguided argument that the appellant must have admitted the commission of the offense to present her entrapment defense. The defense of entrapment is not available to a defendant that *denies* the commission of the offense. Warren v. State, 565 S.W.2d 931; Stephens v. State, 522 S.W.2d 924. This is because a denial of the commission of the offense is inconsistent

with entrapment, as this defense assumes that the offense was committed. *Stephens v. State,* supra. However, the defendant who pleads not guilty and who does not take the stand or offer any testimony inconsistent with her commission of the crime would still be entitled to offer a defense of entrapment. See U.S. v. Groessel, 440 F.2d 602 (5th Cir. 1971). Thus, the defendant is not required to admit the commission of the offense in each case.

In analyzing appellant's vicarious entrapment argument which theorizes that appellant could avail herself of Reyes's possible entrapment defense, we find no merit. Section 8.06 of the Penal Code states:

> (a) It is a defense to prosecution that *the actor* engaged in the conduct charged because *he* was induced to do so by a *law enforcement agent* using persuasion or other means likely to cause persons to commit the offense. Conduct merely affording a person an opportunity to commit an offense does not constitute entrapment. [Emphasis added]
>
> (b) In this section "law enforcement agent" includes personnel of the state and local law enforcement agencies as well as of the United States and any person acting in accordance with instructions from such agents.

Section (a) above mandates that there must be a *direct link* between the defendant and the law enforcement agent. the *defendant* must be induced by the *agent,* not a private citizen as was the case here. Pearson v. United States, 378 F.2d 555 (5th Cir. 1967). It was Reyes who induced appellant's husband who induced appellant to deliver the heroin. There was no showing anywhere in

the record that Hamilton ever made contact with the appellant or induced her to deliver the heroin in any way.

> It is well settled that in order to sustain the defense of entrapment it must appear that the government or someone acting for the government was the initiator of the defendant's act in the sense of having *induced the defendant* to do what the defendant would otherwise not have been willing to do. (Emphasis added)
>
> Sorrells v. U.S., 287 U.S. 435, 53 S.Ct. 210 (1932)

In Wood v. State, 516 S.W.2d 667, we held that where the defendant sold methamphetamine pills to a State agent, partly at the suggestion of an acquaintance from whom he had obtained the pills as security for a loan, and the acquaintance was not a State agent, the State was not guilty of entrapment.

To hold otherwise would not advance the policy behind this "objective" test of entrapment as adopted by the Legislature in Section 8.06, supra, which is to deter police conduct violative of law enforcement standards in a civilized society. As stated, only the individual acted upon by the unscrupulous agent enjoys the benefit of the objective test in Section 8.06. supra. The Legislature in Section 8.06, supra, has balanced the benefit of the deterrent effect upon law enforcement agents of allowing unscrupulously induced defendants to go free, with the cost to society of allowing someone other than the directly induced defendant to avail himself of the defense. We note this same cost-benefit analysis has been applied to illegal search and seizure exclusionary rule questions. The U.S. Supreme Court has balanced the benefit of the deterrent effect upon law enforcement agents who conduct illegal searches and seizures by suppressing the evidence illegally obtained therefrom with the cost to society of suppressing same. Stone v. Powell, 428 U.S. 465, 96 S.Ct. 3037 (1976). Cf. Rakus v. Illinois, ____ U.S. ____, 99 S.Ct. 421 (1978). The immediate and calculable "cost" of sustaining a "vicarious" entrapment defense outweighs the uncertain and therefore negligible deterrent value upon law enforcement agents.

The Legislative intent espoused in Section 8.06, supra, to make entrapment a personal defense and the cost of an unrestricted extension of the defense do not allow vicarious invocation of the entrapment defense.

The objective entrapment test mandates that the trial court, having once determined that there was an inducement, need now consider only the nature of the State agent activity involved, without reference to the predisposition of the particular defendant. See 62 ALR 3rd 110. The reasoning behind this "objective" test for entrapment was described by Justice Stewart in his dissenting opinion in United States v. Russell, 411 U.S. 423, at 441, 93 S.Ct. 1637, at 1647 (1973):

> Thus, the focus of this [objective] approach is not on the propensities and predisposition of a specific defendant, but on "whether the police conduct revealed in the particular case falls below standards, to which common feelings respond, for the proper use of governmental power."
>
> * * * * *
>
> In my view, this objective approach to entrapment advanced by the Roberts opinion in Sorrells and the Frankfurter opinion in Sherman is the only one truly consistent with the underlying rationale of the defense. Indeed, the

> very basis of the entrapment defense itself demands adherence to an approach that focuses on the conduct of the governmental agents, rather than on whether the defendant was "predisposed" or "otherwise innocent."

The vicarious entrapment defense espoused by the appellant attenuates the "cost-benefit" policy by allowing a defendant to discredit the inducement methods of State agents when she was never a party to such inducements. Such a policy would allow entrapment defenses by all defendants involved to prevail ad infinitum from the original improper use of government power by the State agent, regardless of whether each defendant was ever induced by the government to commit the crime in the first place.

In denying appellant's vicarious entrapment defense, we also find that the constitutional error in depriving appellant of her Sixth Amendment right to compulsory process to present a defense was harmless since she in fact had no defense of entrapment.[1] Thus, any error by the trial court in not compelling the State's informant Hamilton to give answers to entrapment questions of the defense or to inquire into the reasons behind his assertion of the Fifth Amendment was harmless beyond a reasonable doubt. *Chapman v. California,* supra; Harrington v. California, 395 U.S. 250, 89 S.Ct. 1726 (1969).

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[1]It is noted that only one question was asked of Hamilton (which was not answered) pertaining to the appellant. Hamilton was asked whether or not he saw the appellant on the day of the offense. It was uncontroverted by the State and the defense that appellant was the person who delivered the bag to Reyes and Braswell on the date in question. Importantly, nothing was asked of Hamilton pertaining to appellant's knowledge that the bag contained heroin. Therefore, we cannot say from the record that appellant was denied such evidence, had Hamilton been able to give it.

Appellant's second ground of error is overruled.

Appellant's third and fourth grounds of error allege that the trial court abused its discretion in questioning four female jurors about the possibility of their having talked about the case to a third party in violation of the court's instructions.

During the course of the trial, the district court judge interrupted proceedings to question four female jurors individually and out of the presence of the other jurors about alleged jury misconduct. The court stated during this questioning that it had information that a woman on the jury had communicated indirectly with the defendant. More specifically, it was the judge's impression that one of the women on the jury had told an inmate at the jail that she would not allow the defendant to be found guilty. Each of the four women denied any such communication. Appellant claims that the questioning itself was improper and caused the jury to be biased against the defendant, denying her right to a fair and impartial trial by jury.

The trial court instructed the jury that it was not to converse with anyone about the case on trial except in the presence and by the permission of the court. The trial court did this in order that the jury would comply with Article 36.22, V.A.C.C.P. Since the court believed its own instructions had been violated, it was perfectly proper for the court itself to make inquiries into possible jury misconduct. Nielssen v. State, 456 S.W.2d 928. Determinations as to jury misbehavior are up to the discretion of the court. Appleman v. State, 531 S.W.2d 806. We do not find the questioning prejudicial to the defendant. The very basis of the question was directed toward obtaining a fair and impartial trial.

Further, if appellant wished to show bias on the part of a juror, her proper remedy was a motion for new trial with an accompanying affidavit by a juror showing such bias. Article 40.03(8), V.A.C.C.P. No such affidavit was presented. Appellant's third ground of error is overruled.

Appellant's fourth ground of error alleges that the trial court erred in its investigation of the alleged juror misconduct during the trial and at the hearing for motion for new trial by not revealing the source of the information about the alleged jury misconduct.

Appellant cites no authority to support her contention that the trial court abused its discretion in not disclosing the source of its information alleging possible jury misconduct during the trial. On the contrary, we find the court's halting the proceedings and conducting a hearing on the matter immediately was proper. Wilkes v. State, 566 S.W.2d 299. *Nielssen v. State,* supra. Based on the jurors' answers to the court's questions, no misconduct had occurred. There was no showing that the defendant was prejudiced by the questioning. (It is also noted that the alleged statement made by the juror would indicate a defense bias *for* the appellant).

This Court has always held that before a new trial is warranted, there must be injury to the accused. Lowe v. State, 226 S.W.2d 674; White v. State, 199 S.W. 1117. Whether or not there was jury misconduct is an issue of fact for the trial court to decide and unless there is a showing that the court abused its discretion, the decision should not be disturbed. *Appleman v. State,* supra.

We find no error committed by the trial court during the hearing and no injury to the appellant.

As far as appellant's motion for new trial is concerned, when the appellant failed to support her motion alleging jury misconduct with supporting affidavits of a juror concerning juror bias as discussed above, the court did not err in overruling that motion. Story v. State, 502 S.W.2d 764. Appellant's fourth ground of error is overruled.

Appellant's final ground of error alleges that the trial court erred in entering the judgment against her because of an alleged fatal variance between the wording of the judgment entered and the offense charged.

The indictment charges appellant with the offense of delivering "to Troy Braswell, a controlled substance, namely, Heroin." The jury verdict as to guilt and innocence and as to punishment both found the defendant guilty as charged in the indictment. The judgment recites:

> The Defendant having been indicted in the above entitled and numbered cause for the felony offense of Delivery of a Controlled Substance, namely: Cocaine . . .

The judgment further recites that the jury finds the defendant guilty as charged in the indictment.

Article 44.24, V.A.C.C.P., provides that this Court may reform and correct the judgment as the law and nature of the case require. Weeks v. State, 476 S.W.2d 310; Gibson v. State, 488 S.W.2d 462. Appellant's fifth ground of error is overruled.

The judgment is reformed to reflect the charge in the indictment and the jury's verdict, and as reform is affirmed.

PHILLIPS, Judge

(Delivered September 19, 1979)

By Panel No. 1, 1st Quarter,
1979, composed of
John F. Onion, Jr., Presiding Judge
W.T. Phillips, Judge
Tom G. Davis, Judge

Davis, J., concurs in the result.

APPENDIX B

COURT OF CRIMINAL APPEALS OF TEXAS
CLERK'S OFFICE

Austin, Texas Oct. 31, 1979

Dear Sir:

I have been instructed to advise that the Court has this day denied the Appellant's Motion for Rehearing En Banc in Cause No. 56,831, Shirley Thrash Norman

vs.

THE STATE OF TEXAS Appellee.

Sincerely yours,

Thomas Lowe, Clerk

APPENDIX C

TRIAL COURT NO. 76-023-R

THE STATE OF TEXAS,

To THE 199th. JUDICIAL DISTRICT COURT OF COLLIN COUNTY – GREETING:

Before our COURT OF CRIMINAL APPEALS, on the 31st day of October A.D. 1979, the cause upon appeal to revise or reverse your Judgment between

SHIRLEY THRASH NORMAN Appellant,

No. 56,831 vs.

The State of Texas, Appellee,

was determined; and therein our said COURT OF CRIMINAL APPEALS made its order in these words:

"This cause came on to be heard on the transcript of the record of the court below, and the same being inspected, because it is the opinion of this Court that there was no error in the judgment, but that there was error in pronouncing judgment and sentence upon the appellant, the judgment and sentence is reformed, to reflect:

the charge in the indictment and the jury's verdict.

It is ordered, adjudged and decreed by the Court that the judgment be in all things affirmed, and that the appellant pay all costs in this behalf expended, and that this decision be certified below for observance."

The Appellant's Motion for Rehearing En Banc is Denied.

WHEREFORE, We command you to observe the order of our said COURT OF CRIMINAL APPEALS in this behalf and in all things to have it duly recognized, obeyed and executed.

WITNESS, the HON. JOHN F. ONION, JR., Presiding Judge of our said COURT OF CRIMINAL APPEALS, with the Seal thereof annexed, at the City of Austin, this 2nd day of November A.D. 1979.

THOMAS LOWE
Clerk.

/s/ Belva Myler
Deputy Clerk.

[Filed Nov 7, 1979]
Jean Young
Clerk District Court,
Collin County, Texas
By /s/ Kathy Whitfield
587

APPENDIX D

SUPREME COURT OF THE UNITED STATES

No. A-642

SHIRLEY THRASH NORMAN,
Petitioner

v.

TEXAS

ORDER EXTENDING TIME TO FILE PETITION FOR WRIT OF CERTIORARI

UPON CONSIDERATION of the application of counsel for petitioner,

IT IS ORDERED that the time for filing a petition for writ of certiorari in the above-entitled cause be, and the same is hereby, extended to and including February 27, 1980.

/s/ Lewis F. Powell, Jr.
Associate Justice of the Supreme
Court of the United States

Dated this 29
day of January, 1980.